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Supreme Court, U.S.
FILED

No. 081256 APR 6 - 2009

OFFICE OF THE CLERK

In The
Supreme Court of the United States

JACQUELINE CHEESE,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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April, 2009

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QUESTIONS PRESENTED

1. Whether the decision of the 6th Circuit regarding "Informed Consent" conflicts with prior United States Supreme Court Decisions, 38 USC 1151 and violates the 9th Amendment to the United States constitution.

2. Whether the decision of the 6th Circuit regarding the use of the court appointed "neutral expert" conflicts with established 6th Circuit precedent and violates the Federal Rules of Evidence.

3. Whether the decision of the 6th Circuit regarding "Damages" conflicts with prior United States Supreme Court Decisions.

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The opinion of the United States Court of Appeals for the Sixth Circuit is unpublished, case no. 06-2430, file name: 08a0521n.06, filed August 26, 2008, and is reprinted and attached to this petition as Appendix B.

Statement of Jurisdiction

The Sixth Circuit Court of Appeals entered its final order, denying our petition for rehearing en banc, on January 6, 2009. This petition is filed within 90 days of that final order as required by United States Supreme Court Rules 13.1 and 13.3. This Court has jurisdiction under 28 USC 1254(1).

Constitutional Provisions

The 9th Amendment states that the "enumeration of certain rights" in the Bill of Rights "shall not be construed to deny or disparage other rights retained by the people."

38 USC 1151

Compensation under this chapter shall be awarded for a qualifying additional disability of a veteran in the same manner if such additional

disability were service connected. For purposes of this section, a disability is a qualifying additional disability if the disability was not the result of the veteran's willful misconduct and the disability was caused by hospital care, medical or surgical treatment in a Department facility as defined in section 1701 (3) (A) of this title, and the proximate cause of the disability was carelessness negligence, lack of proper skill, error in judgment, or similar instances of fault on the part of the Department in furnishing the hospital care, medical or surgical treatment or examination.

Federal Rule of Evidence 103. (d) Plain Error

Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Federal Rule of Evidence 706. (a) Court Appointed Experts

The pertinent part of this rule is that the court may appoint an expert of its own selection and the expert witness shall be subject to cross-examination by each party .

STATEMENT OF THE CASE

This case involves a medical malpractice claim against the United States of America. Plaintiff filed her complaint under the Federal Torts Claims Act in the Eastern District Court of Michigan in April, 2000. The medical malpractice events took place in April 1998, at the Veterans Administration Medical Center, in Ann Arbor, Michigan.

In September of 2001, Defendant filed a Motion for a Court appointed expert to assist the Court. By Order dated November 26, 2001, the Court granted Defendant's Motion for Court Appointed Expert and appointed Dr. Jay Hollander as Court Appointed Expert. The Order Appointing Dr. Hollander indicated that Dr. Hollander was appointed in order to "review Plaintiff's medical records and file a report with the Court".

A bench trial was held that began September 13, 2004 and ended November 15, 2004. During the trial, the Plaintiff was the first witness. She was followed by Beverly Mosely(sister), Carolyn Spencer (sister), Jazym Cheese (daughter), Paul Faux(fellow student) and Dr. Jay Copeland (Expert Urologist).

Deposition testimony was submitted into the record on behalf of Dr. Marlis Pacifico (Family Physician), Dr. James Murphy (Nephrologist), Dr. Eduardo Kleer (Urologist) and Dr. John Hanieski (Expert Economist).

During the trial the Plaintiff testified as to the medical treatment she received as a patient. Her testimony established a strong case of medical malpractice. Each lay witness offered testimony which further supported the Plaintiff's contention that she was employed, auditing classes and living a normal life before the malpractice. After the malpractice, she was unable to work, unable to audit classes, unable to complete the application process at the University of Michigan, had great difficulty taking care of her family, was very sick and in constant pain. The malpractice reduced her lifestyle to that of a pauper.

The Plaintiff's Expert Urologist, Dr. Jay Copeland, testified that the Defendant committed malpractice which caused Plaintiff to lose her good right kidney and rendered her permanently disabled.

The Trial concluded on November 15, 2004. Pursuant to the instructions of the Court, Counsel submitted Proposed Findings of Fact and

Conclusions of Law by December 15, 2004. In his Judgment dated September 27, 2006, the Trial Court, crediting the testimony of Dr. Wood, Dr. Wolf, and the deposition testimony of Dr. Hollander (Conclusions of Law #12), found that the Defendant's doctors had not breached the Standard of Care with regard to the performance of the pelvic washings which caused the perforated kidney, or with regard to the issue of the informed consent to perform the procedures on the right side.

Based on the undisputed testimony of Plaintiff's expert, the Court found that the Defendant breached the standard of care when the Plaintiff was prematurely discharged. However, the court awarded Plaintiff only $15,000 for one day of pain and suffering, despite the fact this act of malpractice left her in daily pain and permanently disabled.

Plaintiff-Appellant appealed to the 6th Circuit Court of Appeals on the issues of informed consent, use of the court appointed neutral expert and damages. The 6th Circuit affirmed the trial court's decision. Plaintiff filed a Petition for Rehearing and on January 6, 2009, the Petition was denied. (Appendix B)

ARGUMENT

The Petition for a Writ of Certiorari should be granted because the ruling by the 6th Circuit Court of Appeals conflicts with prior precedents set by the United States Supreme Court and conflicts with 38 USC 1151. The 6th Circuit wrongfully decided that issue of informed consent. They did not find any clear error on the part of the district court. However, their decision was based on the wrong standard of review. Their decision conflicts with prior precedents set by the United States Supreme Court in *Ornelas v. United States* 517 US 690 (1996) and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 US 424, 434 (2001). In those precedent setting cases, the United States Supreme Court ruled that the de novo standard of review is to be used in deciding questions of law but also when deciding issues that are mixed questions of law and fact.

Their decision conflicts with 38 USC 1151 because the Board of Veterans' Appeals, in their October 16, 2007 opinion, ruled that the VA's care and treatment caused the veteran's (Appellant) additional disability and such care and treatment was provided to the veteran without her informed

consent. Therefore, she is entitled to disability compensation under 38 USC 1151 for the loss of her right kidney.

Further, the 6th Circuit's decision affirming the district court's finding that Plaintiff-Appellant gave her informed consent violates the right to privacy provisions under the 9th Amendment to the United States Constitution. The right of privacy serves to protect individual autonomy and it prevents interference with various areas of personal healthcare. The 6th Circuit's decision, if allowed to stand, would make it very difficult for patients, who have not received information they need to give informed consent, unlikely to detect any violation of their rights, until injury occurs.

The decision of the 6th Circuit regarding the use of the court appointed "neutral expert" conflicts with established 6th Circuit precedent and violates the Federal Rules of Evidence. The court ruled: "that because the district court's findings as to consent and bias are supported by the record, and because Cheese (Appellant) did not otherwise object to the court's use of its expert, we Affirm". Their decision directly conflicts with *United States* v. *Brawner*, 173 F.3d 966 (6th Cir. 1999). The court said: "where the Trial Court has made an

explicit and definitive ruling on the record of the issue to be decided, and has not indicated that the ruling is conditioned upon any other circumstances or evidence, there is no need to renew an objection or offer in order to preserve the issue for appellate reviews."

Federal Rule of Evidence 103 (d) Plain Error, provides that: " Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected" and, in a case where the ruling is one excluding evidence, "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked". Moreover, the Rule goes on to state that: "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal"

Federal Rule of Evidence 706 provides the basis for the Trial Court to appoint an expert witness, either on Motion by one of the parties, or on its own motion. However, that Rule provides for certain parameters regarding the appointment. The witness' deposition may be taken by either

party and the witness may be called to testify at trial by either party.

The Trial Court clearly erred with regard to its Court-appointed expert. The Court abused its discretion in appointing such as expert without clear direction as to what the expert's role would be. The error was compounded by the appointment of an expert who was not neutral, and his questionable impartiality would have subjected him to disqualification under 28 USC 455, had he been appointed under Rule 53. Next, the Court erred in refusing to allow examination of the court-appointed expert at trial. And. finally, by allowing this witness to sit on the bench, beside the Trial Judge, during the testimony of the parties' experts, and to ask questions of them and, indeed, to offer testimony himself, although he was not sworn as a witness, was a clear abdication of the Court's responsibility as fact-finder role, and deprived Plaintiff of her right to have her case decided in a truly fair, adversarial trial.

The 6th Circuit failed to correctly review the issue of damages because they used a standard of review that conflicts with prior decisions of the United States Supreme Court. The district court decided the issue of damages as a mixed question

of law and facts. In *Ornelas* and *Copper Industries, Supra* (page), the United States Supreme Court made it clear that the de novo standard of review is to be used when deciding mixed questions of law and fact. Therefore, the 6th Circuit did not follow the correct legal standard set by prior legal precedent.

CONCLUSION

Based on the foregoing, the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted;

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APPENDIX

SIXTH CIRCUIT COURT APPEALS FILINGS:

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No. 06-2430

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACQUELINE CHEESE,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

ORDER

BEFORE: MARTIN and BATCHELDER, Circuit Judges; and JORDAN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, an no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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*Hon. R. Leon Jordan, Senior United States District Judge for the Eastern District of Tennessee, sitting by designations.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

No. 06-2430

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACQUELINE CHEESE,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

_____/

Before: MARTIN and BATCHELDER, Circuit Judges; and JORDAN,* District Judge.

BOYCE F. MARTIN, JR., Circuit Judge. Jacqueline Cheese suffered complications after a diagnostic exam of her bladder and kidneys performed at a Veterans Affairs Hospital which eventually led to the loss of one kidney. She sued for medical malpractice under the Federal Tort Claims Act alleging breach of the standard of care and lack of consent to the procedure that led to

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*Hon. R. Leon Jordan, Senior United States District Judge for the Eastern District of Tennessee, sitting by designations.

her injuries. The district court found there had been a breach of the standard of care, but only as to an early discharge, and therefore awarded damages only for the pain and suffering she endured during the delay of one day. Cheese now appeals claiming that (1) the court inappropriately used a court-appointed expert, and (2) the district court erroneously found that she consented to the procedure. Because the district court's findings as to consent and bias are supported by the record, and because Cheese did not otherwise object to the court's use of its expert, we AFFIRM.

I

On April 6, 1998, Cheese went to the Veterans Affairs Medical Center due to pain on the left side of her lower back and blood in her urine. Doctors were unable to determine the source of her pain after initial exams, and therefore recommended a cystoscopy retrograde pyelogram. Under this procedure, doctors would insert a tube through her bladder and shoot dye into the ureter (connecting to the kidney) to identify the source of her pain. Prior to the procedure on April 15, Cheese signed a consent form which identified the procedure as "cystoscopy, retrograde pyelogram, possible

uteroscopy (L)." Cheese was anesthetized, and the procedure was performed by senior resident Dr. Robert Marcovich, assisted by Chief Resident Dr. Vashi, and under the direction of attending surgeon, Dr. Stuart Wolf (since the Center is a teaching hospital, Dr. Wolf, a member of the University of Michigan Medical School, oversaw the procedure but it was performed by the residents). The doctors were unable to observe the source of Cheese's pain or blood after examining both sides of her urinary tract. While Cheese was still under anesthesia, they decided that two possible sources of her symptoms were cancer in the urinary tract or a kidney disease that would require a biopsy to detect. To test for cancer, the doctors advanced the catheter farther up Cheese's ureter and performed a washing of the renal pelvis. This involved injecting saline solution through the, catheter, waiting a few minutes, and then withdrawing the solution. The salt water removes some cells from the urinary tract walls which can then be tested for cancer. The procedure appeared to be successful at the time, yet when Cheese awoke she was in excruciating pain on her *right* side - where there had been none prior to surgery. Cheese was kept overnight at the hospital

to monitor her pain, but Dr. Wolf was not informed of her condition. The next morning, April 16, despite continuing high levels of pain, she was discharged by Dr. Seifman, a junior resident. Cheese returned to the hospital on April 17 when her pain did not subside. Dr. Marcovich ordered further tests which showed that urine was leaking from her kidney, apparently from a puncture that occurred to her right kidney during the operation. They inserted a stent later that day, which improved her pain. Cheese then went elsewhere for treatment, having lost faith in the Center. Another doctor removed her stent, but when her condition deteriorated again, a new stent was put in place. During exploratory surgery on July 15, the doctor discovered that her kidney had calcified and was no longer functional. While Cheese was under anesthesia and with permission from the family, he removed the kidney. Cheese was eventually placed on disability due to continuing pain from her left side - the pain that had initially prompted her first hospital visit. It appears there is no treatment available for her pain since further procedures are too risky with only one functioning kidney remaining.

Cheese sued the United States under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, for (1) performing renal washings without consent, (2) performing washings which were unnecessary, (3) prematurely discharging her when she was still in pain on April 16, and (4) failing to place the stent to stop the urine leakage sooner.

On a motion by the defendants, the district court appointed an expert witness under Federal Rule of Evidence 706 to help the court evaluate the competing medical claims. Both parties agreed to the appointment of Dr. Hollander. However, after deposition, Cheese moved to disqualify Dr. Hollander because of alleged bias: he had previously worked with Dr. Wolf, who was involved in the alleged malpractice. The court rejected the motion, finding that Dr. Hollander's knowledge of Dr. Wolf's reputation and his professional contacts with him were insufficient to lead to reasonable questioning of Dr. Hollander's impartiality.

During the bench trial, Dr. Hollander sat with the judge behind the bench and participated in the proceedings by asking questions and providing answers to the judge's questions - some of them substantive. Cheese's attorney asked for

clarification as to Dr. Hollander's role, but never objected to his statements or participation.

After a bench trial, the court found that the Center had violated the standard of care when it discharged Cheese on April 16 despite her continuing high levels of pain. The court also concluded that this violation was the proximate cause of Cheese's pain and suffering between the time of her discharge and the time the stent was inserted. However, the court found that the violation was not a proximate cause of the loss of her kidney. The court also found that the renal washings were part of the retrograde pyelogram, and therefore Cheese had consented to the washings when she consented to the retrograde pyelogram. The court found no other violation. Accordingly, the court awarded $15,000 in damages based on the one day during which Cheese needlessly suffered, and attorney's fees and costs. Cheese then filed this appeal, claiming that the district court erred in denying her the opportunity to cross examine Dr. Hollander on the stand, in denying her motion to disqualify Dr. Hollander for bias, in finding that she consented to washing by consenting to the retrograde

pyelogram, and in awarding damages only for one day.

II

A.

Cheese identifies two sources of error with respect to the court's use of Dr. Hollander. First, Cheese argues that she was denied the opportunity to cross-examine him in contravention of Rule 706. Federal Rule of Evidence 706 provides for the appointment of expert witnesses by the court on its own motion or motions of the parties. Second, she argues that Dr. Hollander should have been disqualified for bias. As to her first argument, we can find nothing in the record to indicate that she requested to cross examine Dr. Hollander at trial. The district court cannot have denied what was not requested. Therefore, we reject the premise of Cheese's first argument - that she was denied the opportunity to cross examine Dr. Hollander.

As to her second argument - that Dr. Hollander should have been disqualified for bias - we have found no cases discussing a requirement of neutrality for court appointed experts. Assuming, as would be reasonable, that some neutrality requirement applies, and assuming that the most

stringent neutrality requirement such an expert would face is that applied to judges, we do not find that the district court abused its discretion in rejecting Cheese's motion to disqualify Dr. Hollander for bias.

A judge must recuse herself when her impartiality might reasonably be questioned, or when she has a personal bias or prejudice. 28 U.S.C. § 455. We review a judge's decision not to recuse herself for abuse of discretion. *Youn v. Track, Inc.*, 324 F.3d 409, 422 (6th Cir. 2003). Bias requiring recusal requires more than a favorable or unfavorable disposition toward an individual. Rather, it results from an opinion that is wrongful either because it is based on knowledge the judge should not possess, or because the opinion is excessively strong. *In re Triple S Restaurants, Inc.*, 422 F.3d 405, 417 (6th Cir. 2005) (citing *Liteky v. United States*, 510 U.S. 540, 550 (1994)). The foundation for the allegations of bias by Dr. Hollander is tenuous. Dr. Hollander (1) speculated that Dr. Wolf might have been able to save Cheese's kidney had she remained in his care, (2) learned an unrelated technique from Dr. Wolf over the course of two days, and (3) had a reciprocal agreement with Dr. Seifman to see each other's

patients for weekend emergencies. As to Dr. Wolf, the district court concluded that though Dr. Hollander was familiar with Dr. Wolf's reputation, such was to be expected given their shared profession, and they were not social friends or professional colleagues. Therefore, Dr. Hollander's impartiality could not reasonably be questioned. We cannot say this was an abuse of discretion given the weak evidence of an excessively positive opinion of Dr. Wolf held by Dr. Hollander, and the lack of any extraordinary connection between the two. As to Dr. Seifman, the district court found that his decision to discharge Cheese was a violation of the standard of care, and therefore any bias Dr. Hollander might have had was not prejudicial to Cheese's case.

B.

Cheese asks this Court to find that the district court's factual findings relating to consent were against the weight of the evidence. We review a district court's factual findings for clear error. *See Harris v. United States*, 422 F.3d 322, 327 (6th Cir. 2005). Cheese presents three specific problems in the trial court's reasoning: (1) that the court misstated testimony upon which it relied (2) that it found a fact in opposition to the court-appointed

expert and (3) that a treatise section upon which it relied was taken out of context. None of these arguments seriously undermines our confidence in the factual findings of the district court.

Cheese first argues that the court misstated testimony. The district court stated that "all of the doctors who testified at trial testified that it is axiomatic in urology that gross hematuria - one of the symptoms Plaintiff Cheese presented - "is cancer until proven otherwise." Cheese points out that the testimony of Dr. Copeland was that gross hematuria *without pain* indicated cancer unless proven otherwise, and Cheese complained of pain. While this statement is true, it does not directly contradict the substantive thrust of the district court's statement, nor does it challenge that the other doctors' testimony supported the court's conclusion. Dr. Wood specifically stated that "pain or no pain, as long as it's not an active infection, it is cancer until proven otherwise."

Cheese next argues that the court found a fact in contradiction to its own expert. The court based part of its reasoning on a finding that washings are a more accurate test for cancer than testing urine. Cheese notes that Dr. Hollander, the court-appointed expert, believed that there was

no proof that one method was more accurate than the other. However, the court's conclusion is supported by the testimony of Dr. Wood that voided urine cytologies are only 40 - 60% accurate with respect to detecting cancer, whereas renal pelvic washings are 100% accurate.

Finally, Cheese argues that the court took a treatise section out of context. The district court credited the testimony of Dr. Wolf and Dr. Wood "that a washing is part and parcel of a retrograde pyelogram procedure." This goes directly to the issue of consent. Cheese challenges this finding by arguing that the section of a medical treatise used to support Dr. Wolf's testimony was taken out of context. Even if that were the case, it does little to show that the court was clearly erroneous in believing the testimony of two medical experts.

We do not find any clear error in these factual findings of the district court as they are supported by the evidence in the record. We therefore affirm the district court's conclusion that Cheese consented to the washings as part of her consent to the retrograde pyelogram.

C.

Cheese argues extensively about the calculation of damages, focusing in particular on

lost future earnings. However, the district court found that the breach of the duty of care was not the proximate cause of any damages beyond the one day delay for which it awarded damages. Finding no reason to question the district court's opinion regarding proximate cause, we affirm its decision not to award further damages.

III

For the foregoing reasons, we AFFIRM the decision of the district court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JACQUELINE CHEESE,
Plaintiff, No. 00-CV-71792-DT

v. Hon. Gerald E. Rosen

UNITED STATES OF AMERICA,
Defendant.
_____/

JUDGMENT

At a session of said Court, held in
the U.S. Courthouse, Detroit, Michigan
on September 27, 2006

PRESENT: Honorable Gerald E. Rosen
United States District Judge

This matter having come before the Court for trial without a jury on September 13-14 and November 15, 2004; and the Court having this date entered an Opinion and Order Setting Forth its Findings of Fact and Conclusions of Law, and being otherwise fully advised in the premises,

NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that JUDGMENT is hereby entered in favor of Plaintiff Jacqueline Cheese and against Defendant United States of America in the amount of $15,000, plus interest, cost and reasonable attorneys fees.[1]

s/ Gerald E. Rosen
Gerald E. Rosen
United States District Judge

Dated: September 27, 2006

I hereby certify that a copy of the foregoing document was served upon counsel of record on September 27, 2006, by electronic and/or ordinary mail.

s/ LaShawn R. Saulsberry
Case Manager

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[1]The Court will enter a supplemental judgment as to the amount of costs and fees awarded following Plaintiff's submission of her attorneys' verified affidavits as set forth in the Opinion and Order of this date

UNITED STATES DISTRICT COURT EASTERN DISTRICT
OF MICHIGAN SOUTHERN DIVISION

JACQUELINE CHEESE,
Plaintiff, No. 00-CV-71792-DT

vs.

Hon. Gerald E. Rosen

UNITED STATES OF AMERICA,
Defendant.
_____/

OPINION AND ORDER SETTING FORTH THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

At a session of said Court, held in
the U.S. Courthouse, Detroit, Michigan on
September 27, 2006

PRESENT: Honorable Gerald E. Rosen
United States District Judge

I. INTRODUCTION

This medical malpractice action, brought by Plaintiff Jacqueline Cheese pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, was tried by the Court without a jury September 13-14 and November 15, 2004. In her Amended Complaint, Plaintiff alleges that physicians who treated her at

the United States Department of Veteran Affairs Medical Center in Ann Arbor, Michigan (the "VAMC") in April 1998 were negligent and violated the applicable standard of care with regard to her medical treatment, causing permanent damage to, and the ultimate removal of, her right kidney.

During the course of the three-day bench trial, the Court heard the testimony of Plaintiff Jacqueline Cheese; Plaintiff's sisters, Beverly Mosly and Caroline Underwood; Plaintiff's daughter, Jazmyn Cheese; Plaintiff's friend, Paul Faux; Dr. Stuart Wolf, Jr., M.D.; Dr. Jay Copeland, M.D.; and Dr. David Wood, M.D. Plaintiff also presented for the Court's post-trial consideration the deposition testimony of Dr. Marlis Pacifico, M.D., Dr. Eduardo Kleer, M.D., Dr. James Murphy, M.D., and economist John Hanieski. The Court also reviewed the deposition testimony of court-appointed expert Dr. Jay B. Hollander, M.D.[1] The Court also received

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[1] Dr. Hollander did not testify at trial but he reviewed the records pertaining to this case and, after he provided the Court with a report, he was deposed by counsel for the parties concerning that report.

into evidence numerous medical records, photographs and diagrams.

Having heard and considered the testimony of the witnesses and the oral arguments of counsel, and having reviewed and considered the exhibits submitted at trial, the Court makes the following findings of fact and conclusions of law.[2] To the extent that any findings of fact constitute conclusions of law, they are adopted as such. To the extent that any conclusions of law constitute findings of fact, they are so adopted.

II. FINDINGS OF FACT

1. Plaintiff Jacqueline Cheese is a divorced mother who lives in Ypsilanti, Michigan with her two children. After graduating from high school in 1982, she attended college for approximately a year and a half and then enlisted in the U.S. Navy. Ms. Cheese served in the Navy

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[2]Following trial, the Court met in chambers with counsel for the parties who indicated that they were going to attempt to resolve this matter extrajudicially. The Court has since been advised that the parties were unable to reach a settlement. Therefore, the Court is issuing this Opinion and Order.

from 1984 until 1988 when she received an honorable discharge. While in the Navy, Ms. Cheese received training as a Pharmacy Technician and after her discharge she worked as a pharmacy technician for several employers, including the University of Michigan Hospital and the VAMC in Ann Arbor. Ms. Cheese was working at the VAMC at the time of the events giving rise to this action.

2. On April 6, 1998, Ms. Cheese went to the Urgent Care Department at the VAMC complaining of left flank pain (i.e., pain on the left side of her lower back) and blood in her urine. She was first seen in the emergency room by Dr. Whelan who told Ms. Cheese that she might have kidney stones and that it might take some time for them to pass. Dr. Whelan, therefore, put her on three days of medical leave.

3. The pain, however, did not subside. Therefore, three days later, on April 9, 1998, Ms. Cheese returned to the VAMC Urgent Care to see Dr. Whelan again. When Dr. Whelan saw that Plaintiffs symptoms had not improved, he referred her to Dr. Apoorva Vashi, the Chief Resident in Urology. Ms. Cheese saw Dr. Vashi that same day.

4. According to Plaintiff, Dr. Vashi was unable to determine what was causing her problem but explained that there was an outpatient procedure that he could do -- a cystoscopy retrograde pyelogram -- which would entail inserting a tube through her bladder and shooting dye into the ureter to allow the doctor to see if it was kidney stones or something else that was causing her pain. Dr. Vashi explained that if it turned out to be kidney stones, the doctor would be able to loosen them up in the same procedure. Plaintiff agreed to the procedure.

5. Plaintiff underwent the procedure on April 15, 1998. Prior to the procedure, Plaintiff signed a consent form which identified the procedure as "cystoscopy, retrograde pyelogram, possible ureteroscopy (L)." The form also described the possible risks of the procedure as "bleeding, infection, [and] injury to ureter." Plaintiff testified that the procedure and these risks were explained to her by Dr. Vashi on April 15. According to Plaintiff, all of her discussions prior to the procedure with Dr. Vashi concerned her left side pain; her right side and right kidney were never mentioned. At the same time, however, no testimony presented at trial concerning Dr. Vashi's pre-operative discussion

with Plaintiff indicates that Dr. Vashi ever told Plaintiff that the procedure was to be done only on her left kidney.[3]

6. After signing the consent form and discussing the procedure with Dr. Vashi, Plaintiff was given an anesthetic and put to sleep for the procedure. The procedure was performed by Dr. Robert Marcovich, a senior resident, under the direction of the "attending surgeon," Dr. Stuart Wolf, M.D. Dr. Wolf is a board certified urologist and he is also a member of the University of Michigan Medical School faculty. Dr. Vashi, the Chief Resident, assisted Dr. Marcovich.

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[3]It appears that Plaintiffs belief that the April 15, 1998 procedure she underwent would only involve her left side kidney sterns from what was indicated on the consent form she signed -- "cystoscopy retrograde pyelogram, possible ureteroscopy a **(L)** , " [Emphasis added.] However, as discussed *infra*, the undisputed testimony of all of the doctors involved was that the "L" or "left side" limitation pertained only to the "possible ureteroscopy" – a procedure which the doctors decided not to perform on Plaintiff. What was performned was a cystoscopy and retrograde pyelogram for which no left-side limitation was indicated.

7. Dr. Wolf testified that any surgical procedure done at the V AMC has to be staffed by a faculty member from the University of Michigan who also has an appointment at the V A.[4] Because the VAMC is a medical training facility, the attending surgeon's role is to train residents, while at the same time, insure that good clinical care is provided. As such, during surgical procedures such as Ms. Cheese's procedure, Dr. Wolf is in the operating room directing the procedure but he does not himself physically perform the procedure. The actual surgery is performed by the residents. In Ms. Cheese's case, the surgery was performed by a senior resident, i.e., a resident in urology who was half-way through his six year residency, and he was

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[4] Dr. Wolf explained that almost all of the faculty at the Ann Arbor VA, as with any Veterans' Administration Medical Center, have a primary appointment at a nearby medical school, and then practice at the VA part-time as a shared faculty member. He testified that at the time in question, he was a three-eighths time VA doctor, i.e., he worked at the VAMC 15 hours per week divided over the course of two or three days, depending on the schedule for the week.

assisted by the chief urology resident who was in the sixth (i.e., final) year of his residency.

8. Dr. Wolf never met Ms. Cheese other than in the operating room. Dr. Wolf testified that this was standard practice in what would be considered a straightforward case.[5] Dr. Wolf explained that the day before or the morning of a scheduled surgical procedure, the resident, usually the chief resident, would present each case to the attending surgeon. This would include the resident's description of the patient's problem, his assessment of the risk and benefits of the procedure, and his assessment of the surgical plan. Dr. Wolf then would either approve it carte blanche, or he might question the resident further to learn more before giving his approval.

9. With respect to Plaintiffs surgical procedure, Dr. Wolf explained that Ms. Cheese had two problems: one was left flank pain, and the other was gross hematuria, meaning blood in her

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[5]Both Plaintiffs expert, Dr. Jay Copeland, and Defendant's expert, Dr. David Wood, agreed that this is what transpires at any teaching hospital -- the attending physician does not normally see the patient.

urine that could be seen with the naked eye. Dr. Wolf explained that Plaintiff had already had a CT scan, which is the most sensitive way to detect the most common problem that would cause both of those two problems together, which would be a kidney stone, and the CT scan did not reveal that. Therefore, the doctors determined that they had to put her through some additional diagnostic procedures to find out why she had pain and blood in the urine.

10. Dr. Wolf explained that the procedure Ms. Cheese underwent -- the cystoscopy retrograde pyelogram – was actually two-part procedure. First, the doctors performed a cystoscopy, which involved inserting a small scope with a light source into the bladder and looking all around the bladder to see if there are stones or tumors or some other obstruction. Because, no obstruction was observed, the doctors continued with the second part of the procedure, the retrograde pyelogram, to evaluate problems originating the upper urinary tract, i.e., in the ureters, the renal pelvis or the kidneys.[6] Dr. Wolf

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[6]Dr. Wolf explained that another way to examine the upper urinary tract is by performing a

explained that this entailed passing a catheter up the ureter into the renal pelvis and injecting a contrast material, and then, using x-ray equipment, the doctors could examine the upper urinary tract.[7]

11. Dr. Wolf testified that it was always intended before the entire procedure was started that it would be a bilateral procedure, not just on

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ureteroscopy, which is one of the things Ms. Cheese consented to in the consent form, but the doctors elected not to do this procedure. Dr. Wolf explained that this procedure is rarely performed because its harder on the patient. Therefore, it is only done it if an abnormality is detected in the retrograde pyelogram. As discussed *infra*, no abnormality was detected in Ms. Cheese's retrograde pyelogram. Furthermore, Dr. Wolf explained that in Ms. Cheese's case, she only consented to a ureteroscopy on her left side so they did not view it as an option.

[7]Dr. Wood explained that normally contrast dye would be injected into the patient by vein and then the urinary tract would be x-rayed. But, because Ms. Cheese had an allergy to the contrast material, the doctors could not inject the dye by vein. So, instead, they had to inject the contrast dye through the urinary tract so it would not react with the blood stream, and get an assessment that way.

the left side of the urinary tract. He explained that because the blood in Ms. Cheese's urine could have been coming from anywhere in the urinary tract, it was important to examine both the left and the right sides. Even if the doctors observed blood coming out of the left side, the standard of care requires investigating both sides. "It would be gross substandard care to only assess one side." [9/13/04 p.m. Tr., pp. 21-22.]

12. After doing the retrograde pyelogram on Ms. Cheese on both sides, the doctors still could find nothing wrong -- no obstruction, no stones, no cavities, no diverticula, or blockages. Dr. Wolf testified that at this point, the doctors felt that there were two general categories of problems that could have been causing Ms. Cheese's pain and hematuria: (1) a cancer lining the urinary tract that does not bulge out; or (2) a disease of the kidney, which to detect, would require a kidney biopsy.

13. Dr. Wolf testified that in such situations, the general rule is to assess the lining of the urinary tract first, and then assess the kidney, and the decision was made to proceed according to this general rule with respect to Jacqueline Cheese.

14. To assess the urinary tract lining, while they had a catheter already inserted, the doctors

did a washing of the renal pelvis. Dr. Wolf testified that a washing is part and parcel of the retrograde pyelogram. A washing, Dr. Wolf explained, is done to knock some cells off of the urinary tract walls. To do the washing, the same catheter that was used for Ms. Cheese's retrograde pyelogram was advanced further up the ureter. A small amount of saline was then injected through the catheter and after a few seconds it was pulled out. The cells were then collected and sent to a cytopathologist for analysis as to the presence of carcinoma.[8]

15. Dr. Wolf testified that there were no noted complications with the renal pelvic washing procedure performed on Ms. Cheese. He testified that the typical sign of a perforation or puncture having occurred would be not getting back the saline fluid instilled in the patient or if the fluid carne out very, very bloody, neither of which occurred in Ms. Cheese's case. The doctors, therefore, left the operating room believing that the procedure had gone well.

16. Plaintiff testified, however, that when she woke up in the recovery area after the

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[8]The cells collected from Ms. Cheese were negative for cancer.

procedure, she had "excruciating pain" on her right side. She said that her left side still hurt, but the pain on the right side of her body was "horrible." Plaintiff testified that when she told this to the anesthesiologist, Dr. Nair, in the recovery area, he told her that she had mentioned being in a lot of pain when she first carne out of the operating room. She said that Dr. Nair told her that they had immediately given her 700 micrograms of Fentanyl and that that was an unusually high dosage.

17. Plaintiff then saw Dr. Marcovich who conducted the post-operative interview with her. (Plaintiff testified that she did not see Dr. Vashi after the procedure.) Plaintiff testified that Dr. Marcovich told her that during the procedure he had looked at her left kidney through the scope and did not see any kind of obstruction. She said that the cystoscopy was all that was discussed with her about the procedure at that post-op interview.

18. Plaintiff testified that she also told Dr. Marcovich about this new pain on her right side. Although Plaintiffs procedure is normally an outpatient procedure, Dr. Marcovich decided that, in light of Plaintiff s continued complaints of pain, she should be admitted to the hospital and kept overnight for observation. Dr. Marcovich toid her if

everything they saw overnight was fine, they would send her home the next day. Plaintiff was given Percocet at this time and then, once admitted, she started receiving morphine every two to three hours until she left the hospital. She was last given morphine a half an hour before being discharged.

19. Plaintiff testified that she was in considerable pain the entire night she spent in the hospital and was still in pain at the time of her discharge.[9] No diagnostic study, however, was performed during her overnight stay to try to ascertain why Plaintiff was having such severe pain on her right side, nor was Dr. Wolf, the attending urologist, ever notified that Plaintiff was in such severe pain and was requiring high doses of narcotics.[10] Plaintiff further testified that the urine

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[9]The hospital records confirm this. According to the records pertaining to Plaintiffs overnight stay in the hospital, Plaintiff repeatedly complained of "severe abdominal pain" and "severe pain" throughout the night and early morning, as late as 9:25 a.m. on April 16, 1998, i.e., less than 20 minutes before Plaintiff was discharged. *[See* Plaintiffs Ex. D6; *see also,* 9/13/04 p.m. Tr. p. 94.]

[10]The hospital records indicate that on April 15, 1998 Plaintiff was given Percocet at 3:45 p.m.; at 5:30

she was discharging during the night was of a brownish color and as time went one, she became nauseated and began running a fever. The doctors gave her Maalox for the nausea. Plaintiff then began itching as a result of the morphine, and was given Benadryl to relieve the itching. Plaintiff testified that when she got the Benadryl, coupled with the morphine doses, she was finally able to get a couple hours of sleep. The pain, however, did not go away.

20. The next morning, April 16, Plaintiff was seen by Dr. Brian Seifman, a junior resident. Plaintiff testified that she told Dr. Seifman about the new pain she had on her right side and that she did not

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p.m. she was given four milligrams of morphine; at 8:00 p.m. she was given another four milligrams of morphine; at 11:15 p.m. she was given an increased dosage -- six milligrams -- of morphine; at 12:35 p.m. she was given two more tablets of Percocet then 40 minutes later -- at 1:15 a.m. on April 16 -- she was given another six milligrams of morphine; at 3 :25 a.m. she was given another six milligrams of morphine; at 5:45 a.m. she was given another 6 milligrams of morphine; and at 9:25 a.m. she was given another four milligrams of morphine. *[See* Plaintiff's Ex. D4; *see also* 9/13/04 p.m. Tr. pp. 90-92, 94.]

understand why. According to Plaintiff, Dr. Seifman told her only that sometimes after these procedures, people are a little sore and that every patient is different. Dr. Seifman gave her some pain medication to take at home and an off-work note from Dr. Vashi which indicated that she had had surgery and placed her on medical leave until April 21, 1998. Then, as authorized by Dr. Marcovich, Dr. Seifman discharged her.[11]

21. Plaintiff was driven home from the hospital by a friend. Plaintiff testified that she was still in pain when she got home and went immediately to bed. At approximately 3:00 a.m. the next day, April 17, Plaintiff testified that the pain became so severe that it woke her up. She tried to take more pain medication but threw up. She tried to eat a cracker to ease the nausea, to no avail. Finally, she had her neighbor call the hospital. The hospital directed the neighbor to bring Plaintiff back in.

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[11] Dr. Marcovich testified in his deposition that it was probably his assessment that Plaintiff was ready to go home based on "improved pain." He did not recall, however, if he discussed the discharge with Dr. Vashi. [Marcovich Dep., p. 34.]

22. Plaintiff testified that it was mid-morning on April 17 when she arrived back in the emergency room of the VAMC and was seen by Dr. Marcovich. According to Plaintiff, Dr. Marcovich' s reaction when he first saw her was, "I thought I might see you back here." [9/13/04 Tr. p. 63.] Plaintiff testified that she related to Dr. Marcovich that she was having severe pain in her right side and could not understand why since she had previously come in for treatment for pain on her left side. Dr. Marcovich then ordered some tests.

23. Plaintiff was first sent to radiology where x-rays were taken. Then, a CT scan was performed on her. According to Plaintiff, the radiologist who performed the CT scan informed her that he could see on the screen that she had some liquid leaking from her kidney. She then was seen again by Dr. Marcovich who told her that they were going to have to insert a stent to keep urine from leaking from her right kidney. According to Plaintiff, when she asked Dr. Marcovich why urine would be leaking from her right kidney, he told her it must have been something that was

done while the doctors were performing the procedure on April 15.[12]

24. Plaintiff then saw Dr. Vashi. According to Plaintiff, Dr. Vashi told her that it was a very rare thing to happen and that he had never seen anything like this happen before, but that during the April 15 procedure, her right kidney had been punctured.

25. Plaintiff signed another consent form for the stent procedure. She testified that Dr. Marcovich went over this form with her very carefully and that she fully understood everything on the form, including that the indicated risks were bleeding, infection and injury to the urinary tract, including her bladder and kidneys. The procedure was then performed, and Plaintiff testified that after the stent was inserted she was a lot more comfortable; that the pressure and throbbing that she had felt in her right kidney had been

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[12] Dr. Marcovich presumes that the perforation occurred during the portion of the procedure on April 15 when they obtained the renal washings from the right side. He does not know exactly what happened or who injured the kidney. [Marcovich Dep., p. 40.]

somewhat alleviated. She was, however, kept in the hospital for a week, until April 23, 1998. During her hospital stay, Plaintiff testified that she regularly saw Dr. Vashi and Dr. Marcovich.

26. Plaintiff was discharged from the hospital on April 23rd. Upon her discharge, Ms. Cheese was placed on restricted activity and directed to stay off-work until mid-May. She was given a return appointment to return on May 13, 1998 for surgery to remove the stent. Following her discharge, Plaintiff testified that she continued to experience blood in her urine and continued to have some pain, but not as acute as it had been on April 15th and 16th.

27. Plaintiff, however, never returned the VAMC for the removal of the stent or any other follow up. She testified that she had lost faith in the VA and decided to pursue treatment elsewhere. After talking to friends, she called the Huron Valley Urology Clinic in Ypsilanti and scheduled an appointment with Dr. Eduardo Kleer on May 8, 1998.

28. Plaintiff testified that before her first appointment with Dr. Kleer, she obtained her medical records from the VA, and gave them to Dr. Kleer on May 8. According to Plaintiff, it was Dr.

Kleer who, after reading the VA records, told her that the VA doctors had performed a right renal pelvic washing on her on April 15, 1998. Plaintiff testified that this was the first time she had been informed of the right renal pelvic washing. (This information was contained in the medical records that Plaintiff had obtained from the VA, but she admits she never read them.)

29. According to Plaintiff, at the May 8 appointment with Dr. Kleer, after Plaintiff presented her medical history and the doctor examined her, the doctor told her that he would have her come back in a couple of weeks, at which time he would remove the stent "and everything should be fine." [9/13/04 Tr., p. 81.]

30. Plaintiff testified that she returned as directed by Dr. Kleer for the removal of the stent two weeks later, but that within 24 hours after the stent was removed, she ended up at St. Joseph Mercy Hospital's emergency room with renewed pain. A CT scan was performed on Plaintiff and she was told that her right kidney was not functioning. So, Dr. Kleer put another stent in, which Plaintiff testified was kept in for about a month. Thereafter, Plaintiff treated with Dr. Kleer on a regular basis. She testified that she saw him at least twice a

month. Meanwhile, Dr. Kleer kept her off work on medical leave.

31. When Plaintiffs condition failed to improve, Dr. Kleer informed Ms. Cheese that the only way he would be able to get a clear look at what was happening was to perform exploratory surgery.

32. On July 15, 1998, Dr. Kleer performed surgery on Plaintiff. Plaintiff testified that originally, Dr. Kleer had told her he was going to try to scrape off some of the scar tissue from her kidney that had developed after her kidney had been punctured. However, once the doctors began the operation, what started as minor surgery turned into something totally different: Dr. Kleer discovered that Plaintiffs right kidney had calcified; it was "as hard as cement" and was not functional. [9/13/04 Tr. p. 86.] After obtaining permission from Ms. Cheese's family, Dr. Kleer removed Plaintiffs right kidney.

33. All of the doctors who testified at trial, including both Plaintiffs and Defendants' experts, admitted that, in most cases, a ureteral or renal pelvic puncture will heal uneventfully. They all also agreed that they had never before seen a case like Plaintiff's where a puncture and leakage of

urine caused such severe scarring that the kidney calcified and had to be removed.

34. Following the removal of her right kidney, Plaintiff remained off work and on medical leave until her employment as a pharmacy technician at the VAMC was terminated on December 18, 1998. Meanwhile, Plaintiff continued to treat with Dr. Kleer and her primary care physician, Dr. Marlis Pacifico. Although the loss of her right kidney causes Plaintiff no pain or disability, she continues to suffer from "loin pain hematuria syndrome" or "LPHS" with respect to her left kidney, which was the source of the original pain when she presented to the VAMC Urgent Care in April 1998.

35. Plaintiff testified that in February 1999, Dr. Pacifico referred her to Dr. James Murphy, a nephrologist. According to Plaintiff, Dr. Murphy told her that because she had only one kidney, there were no treatment options available for her left kidney problem.[13] She continues to have constant

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[13] Although Defendants' expert, Dr. David Wood, testified that there are treatment options available for Plaintiffs LPHS, including auto-transplantation and renal innervations, that are not precluded even though Plaintiff has only one kidney, Dr. Wood testified that undergoing such procedures

loin pain and testified that urinating is difficult and very painful. She said that her urine now is thick and bloody.

36. In April 1999, Plaintiff applied for, and subsequently was placed on Social Security Disability due to her LPHS. She remains on Social Security Disability to this date. She testified that she is still unable to work or go to school and takes 11 or 12 different medications every day. She testified that her only current medical treatment is "pain management."

37. Plaintiffs expert, Dr. Jay Copeland, a board certified urologist, agreed with Dr. Wolf, that doing a bilateral retrograde pyelogram (i.e., retrograde pyelogram on both her left and right sides) was appropriate and allowable. But, Dr. Copeland opined that it was inappropriate for the VAMC doctors to do a renal pelvic washing on either side. In his opinion, the consent form that Plaintiff signed did not cover renal pelvic washings. He further opined that the pyelogram would have given a sufficient diagnostic scope to determine if

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does not completely eliminate the patient's pain and it can, and in a large percentage of cases does, recur.

cancer was present, and, therefore, the washings were not necessary.

38. In Dr. Copeland's view, washings should only be used where there is a high index of cancer that is not voidable. In other words, washings are done only if nothing is detected on a pyelogram and nothing is shown on a CT scan, but voided urine tests show the presence of cancer cells. Plaintiff's voided urine tests did not show the presence of cancer cells. Therefore, it is Dr. Copeland's opinion that the standard of care was violated both when the VAMC doctors failed to obtain Plaintiff's separate consent for the renal pelvic washings and, again when they decided to do washings.[14]

39. Defendant's expert, Dr. David Wood, also a board certified urologist, disagreed with Dr.

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[14] Dr. Copeland also opined that the washings were not competently done, that they should have been done on the bladder first, then on the left side, and then on the right. Here, they were done in reverse of that order. He also said that they should have changed catheters on each side which was not done here. Nevertheless, Dr. Copeland admitted that if they had done the washings his way it would not have avoided injury.

Copeland. In Dr. Wood's view, part and parcel to the evaluation of hematuria is a retrograde pyelogram with renal pelvic washings. Accordingly, he testified that he does not believe that a separate consent was needed for the renal pelvic washings because, "I believe it's part and parcel to the entire procedure." [11/15/04 Tr. p. 80.]

40. Dr. Wood explained that the main reason any of the procedures were done on Ms. Cheese was to rule out cancer. He noted that Ms. Cheese is a smoker and had gross hematuria. As both Plaintiff's and Defendant's experts acknowledged, it is an axiom in urology that gross hematuria is cancer until proven otherwise.

41. Dr. Wood testified that, while you could do a voided urine cytology, you would still need to do washings to rule out cancer. He explained that voided urine cytologies only provide a 40-60% accurate diagnosis; washings, on the other hand, are 100% accurate -- even better than imagings – and the additional risk of washings being so small, it is hardly worth the risk of missing the cancer to not do them. He agrees that it is not malpractice to only do a voided urine cytology but said that washings are preferable, adding, "it's a

judgment call," left to the discretion of the surgeon.[15]

42. Plaintiffs expert, Dr. Copeland, also testified that, in his opinion, the standard of care was also violated by the VAMC doctors when they discharged Ms. Cheese prematurely on April 16, 1998, the morning after her procedure, when she was still in a great deal of pain and required heavy doses of narcotics, without having done any diagnostic tests to determine the cause of the pain.

43. Neither Dr. Wolf nor Dr. Wood refuted Dr. Copeland's opinion. Dr. Wolf, in fact, testified "I very much wish we had not discharged Miss Cheese home because she went through suffering that she didn't need to." [0/13/04 p.m. Tr., pp. 37-38.] Dr. Wood also admitted that, in retrospect, given the level of pain Ms. Cheese was experiencing as evidenced by the quantity and

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15 Dr. Wood's opinion as to the propriety of doing renal pelvic washings in conjunction with a retrograde pyelogram is consistent with that espoused in the Campbell's Urology (Sixth ed.). *See* testimony of Dr. James Wolf, reading from Campbell's Urology (Sixth ed.), p. 1141. [9/13/04 p.m. Tr. pp. 43-44.]

dosages of narcotics she was given, somebody more senior should have been called in before she was discharged. He nonetheless tried to explain away the decision to discharge Ms. Cheese stating that in the V.A. system, "the nurses and the ancillary [discharge planning] people are very much empowered to do what's best for the patient," and that "you have to trust the people that are there." *[See* 11/15/04 Tr. pp. 95-96.] Dr. Wood reasoned that because the decision was made to discharge Ms. Cheese, more than one of the health care workers "obviously felt her pain was getting better and wasn't bad enough to require investigation." *Id.* at 97. In his view, if Plaintiff was in so much pain, someone in the health care system would have refused to release her. *Id.* at 96-97.

44. Plaintiffs expert, Dr. Copeland, also opined that the standard of care was again violated by the VAMC doctors when they did not stent Ms. Cheese to stop the leakage of urine from her right kidney until late in the afternoon of April 17, 1998, 58 hours after the retrograde pyelogram procedure.[16] In Dr. Copeland's opinion, had the

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[16]The hospital records show that Plaintiff returned to the hospital at 11:17 a.m. on April 17, 1998 and a

stent been inserted sooner, it would not only have alleviated Ms. Cheese's pain, but also it would have greatly reduced, although would not have entirely eliminated, the danger of scarring which was what led to the calcification, and ultimately the removal, of Ms. Cheese's kidney. Dr. Copeland admitted, however, that while there would have been less scarring had the stent been inserted earlier, he could not be certain that enough scarring would have been avoided such that the ultimate nephrectomy would not have been needed.

45. Dr. Wood, on the other hand, testified that in the ordinary course with a perforation, he would not necessarily stent the patient but would keep her under observation. He opined that given the sequence of events in Ms. Cheese's case, 58 hours after the procedure -- which was a little over

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renal ultrasound done less than 3 hours later, at 1: 16 p.m. gave the first indication that fluid was leaking from her kidney. This was confirmed by a CT scan done at 4:06 p.m., and by 4:30 p.m., Ms. Cheese was being prepped for the stent placement surgery. She was taken into the operating room by 5:15 p.m.

24 hours after her discharge -- was not an unusually long time to wait to do a stent.

III. CONCLUSIONS OF LAW

1. Plaintiff has brought this action against the United States of America pursuant to the Federal Tort Claims Act, 28 U.S.C. §2671, *et seq.*, claiming that the doctors at the Veterans' Administration Medical Center in Ann Arbor violated the standard of care with respect to her treatment by (1) failing to obtain her permission to perform renal pelvic washings on her on April 15, 1998; (2) performing renal pelvic washings which Plaintiff claims were unnecessary under the circumstances; (3) prematurely discharging Plaintiff from the hospital on April 16, 1998 when she was still under considerable pain and without determining the cause of the pain; and (4) failing to stent Plaintiff sooner than 4:30-5 :00 p.m. on April 17, 1998 to stop the leaking of the urine.

2. The liability of the United States of America under the Federal Tort Claims Act is to be determined in the same manner and to the same extent as a private individual under like circumstances. 28 U.S.C. §2674.

3. 28 U.S.C. § 1346(b) provides that the district courts shall have exclusive jurisdiction of civil actions on claims against the United States for money damages for personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

4. The alleged negligent treatment of Plaintiff Jacqueline Cheese occurred at the Veterans' Administration Medical Center in Ann Arbor, Michigan. Therefore, pursuant to 28 U.S.C. § 1346(b), the law of Michigan is to be applied in this case.

5. In order to establish a cause of action for medical malpractice, a plaintiff must establish four elements: (1) the appropriate standard of care governing the defendant's conduct at the time of the purported negligence, (2) that the defendant breached that standard of care, (3) that the plaintiff was injured, and (4) that the plaintiffs injuries were the proximate result of the defendant's breach of the applicable standard of

care. *Craig ex rel. Craig* v. *Oakwood Hosp.* 471 Mich. 67, 86, 684 N.W.2d 296, 308 *(2004); Weymers* v. *Khera, MD.,* 454 Mich. 639, 655, 563 N.W.2d 647,655 (1997). *See also,* M.C.L. § 600.2912a.

5. The Michigan legislature has codified the standard of care to be applied in medical malpractice cases. The relevant statute provides:

> In actions alleging malpractice, the plaintiff shall have the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:
>
> (a) The defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice in the community in which the defendant practices or in a similar community, and that as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.
>
> (b) The defendant, if a specialist, failed to

> provide the recognized standard of care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

M.C.L. §600.2912a.

6. The law only demands that the practitioner use the skill, care, knowledge and attention ordinarily possessed and exercised by others of the profession under like circumstances. *Jones* v. *Poretta*, 428 Mich. 132, 143-46,405 N.W.2d 863, 869-70 (1987); *Clevelandv. Rizzo*, 99 Mich. App. 682, 298 N.W.2d 617, 619-620 (1980); *Viland v. Winslow*, 34 Mich. App. 486, 191 N.W.2d 735,737 (1971).

7. Absent a departure from the established standard of care, a practitioner is not liable for an unfortunate or bad result. *See, Jones*

v. *Porretta, supra* 428 Mich. at 144, 405 N.W.2d at 869; *Gore* v. *United States,* 229 F. Supp. 547,549 (E.D. Mich. 1964). The mere fact that full recovery does not result or that adverse consequences occur is not in itself evidence of negligence. *See, Roberts* v. *Young,* 369 Mich. 133,119 N.W.2d 627, 629 (1962) (quoting, *Zoterell* v. *Repp,* 187 Mich. 319, 330, 153 N.W. 692, 695 (1915)).

8. The plaintiff has the burden of proving both the standard of care and the defendant's breach of that standard. *Koch* v. *Gorrilla,* 552 F.2d 1170, 1174 (6th Cir. *1977); Murphy* v. *Sobel,* 66 Mich. App. 122, 238 N.W.2d 547, 549 (1975); *Mitz* v. *Stern,* 27 Mich. App. 459, 183 N.W.2d 608, 611 (1970). The plaintiff must also establish that the breach of the standard of care was a proximate cause of his injury. *Weymers* v. *Khera, supra,* 454 Mich. at *647; Ghezzi* v. *Holly,* 22 Mich. App. 157, 177 N.W.2d 247, 250 *(1970). See also* M.C.L. § 600.2912a(2):

> (2) In an action alleging medical malpractice, the Plaintiff has the burden of proving that he or she suffered an injury more probably than not was proximately caused by

> the negligence of the Defendant or Defendants ....

Id.

9. Michigan law requires a plaintiff to produce expert testimony to show the applicable standard of care and the fact that it was breached. The Michigan Supreme Court has stated:

> In a case involving professional service, the ordinary layman is not equipped by common knowledge and experience to judge of the skill and competence of the service and determine whether it squares with the standard of such professional practice in the community. For that, the aid of expert testimony from those learned in the profession is required.

Locke v. *Pachtman,* 446 Mich. 216,223,521 N.W.2d 786,789 (1994) (quoting *Lince* v. *Monson,* 363 Mich. 135, 140, 108 N.W.2d 845 (1961)). *See also Koch* v. *Gorrilla, supra.*

10. It is equally well-settled that expert testimony is required to establish that a physician's

negligence was a proximate cause of the injury for which damages are sought. *Wallace* v. *Garden City Osteopathic* Hospital, 111 Mich. App. 212,217,314 N.W.2d 557, (1981), *rev'd on other grounds,* 417 Mich. 907,330 N.W.2d 850 (1983); *Ghezzi* v. *Holly, supra,* 177 N.W.2d at 250.

11. "Proximate cause" is a legal term of art that incorporates both cause in fact and legal (or "proximate") cause. *Craig* v. *Oakwood Hospital,* 471 Mich. 67, 86, 684 N.W.2d 296, 309 (2004). The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. *Id.* 471 Mich. at 87, 684 N.W.2d at 309 (citing *Skinner* v. *Square D. Co.,* 445 Mich. 153, 162-63, 516 N.W.2d 475 (1994)). On the other hand, legal cause or "proximate cause" normally involves examining the foresee ability of consequences, and whether a defendant should be held legally responsible for such consequences. *Craig,* 471 Mich. at 87, 684 N.W.2d at 309. As a matter of logic, a court must find that the defendant's negligence was a cause in fact of the plaintiffs injuries before it can hold that the defendant's negligence was the proximate or legal cause of those injuries. *Id.* Generally, an act or omission is a cause in fact of

an injury only if the injury could not have occurred without (or "but for") that act or omission. *Id.* While a plaintiff need not prove that an act or omission was the sole catalyst for his injuries, he must introduce evidence permitting the jury to conclude that the act or omission was a cause. *Id.* (citing *Jordan* v. *Whiting Corp.*, 396 Mich. 145, 151, 240 N.W.2d 468 (1976)).

A. The Consent Form and Decision to Perform Renal Pelvic Washings

12. Applying the foregoing authorities to the facts adduced at trial in this case, and having considered and weighed the testimony of the witnesses and the record evidence submitted, the Court concludes that Plaintiff has not proven that the physicians at the VAMC breached the medical standard of care by not obtaining Plaintiffs specific consent to perform renal pelvic washings prior to the commencement of the retrograde pyelogram procedure on April 15, 1998 or by deciding to do the washings after the retrograde pyelogram showed no abnormalities. As to these claims, the Court credits the testimony of the attending urologist, Dr. Wolf, and Defendant's expert, Dr. Wood, that a washing is part and parcel of a retrograde pyelogram procedure, and, therefore,

no separate consent was required. Further, as Dr. Wolf and Dr. Wood testified, and as Dr. Hollander, the court-appointed expert, explained in his deposition, the technical aspects of a renal pelvic washing are very similar to the technical aspects of retrograde pyelograpy and it is not a violation of the standard of care for urologists to change their plan in the middle of a procedure and say "let's get a washing now," rather than to have to do another separate invasive procedure later.

13. Although, as Dr. Wood testified, it is not malpractice to do, instead of washings, a voided urine cytology, as espoused by Plaintiffs expert, Dr. Copeland, the Court credits Dr. Wood's testimony that voided urine cytologies are only 40-60% accurate with respect to detecting cancer, whereas renal pelvic washings are 100% accurate. As Dr. Wood explained, the additional risk of doing a washing in the course of a retrograde pyelogram procedure when the catheter is already in the ureter is so small that it is hardly worth the risk of missing the cancer to not do them.

14. All of the doctors who testified at trial testified that it is axiomatic in urology that gross hematuria -- one of the symptoms Plaintiff Cheese presented -- "is cancer until proven otherwise." This

accepted medical axiom coupled with the testimony of Drs. Wolf, Wood and Hollander, persuade the Court that there was no violation of the standard of care when the doctors decided to do renal pelvic washings on Plaintiff on April 15, 1998.

B. The Stenting Procedure

15. The Court also concludes that Plaintiff has failed to establish a violation of the standard of care on the part of the VAMC doctors when they did not stent Ms. Cheese earlier than they did, around 4:30 or 5:00 p.m. on April 17, 1998. The Court again credits Dr. Wood's testimony that the ordinary course of treatment of a patient who has suffered a perforation of the kidney requires only keeping the patient under observation and that with the sequence of events in Ms. Cheese's case, stenting her within a little over 24 hours after discharge and within less than 10 hours after she returned to the hospital complaining of pain on April 17, 1998, was not a violation of the standard of care.

16. The contradictory opinion of Dr. Copeland, Plaintiffs expert, that Ms. Cheese should have been stented sooner, is predicated upon Dr. Copeland's "gut feeling" that had she been

stented 20 hours, after the procedure i.e., the morning of April 16, 1998, instead of 58 hours after the procedure, the afternoon of April 17, 2/3 less urine would have been extravasated, meaning that potentially there might less scarring of Ms. Cheese's kidney. Dr. Copeland, however, admitted that the presence of urine outside the kidney and the renal pelvis if uninfected is not, by itself, a medical emergency and the natural course of the human body would ordinarily be for urine to be reabsorbed into the surrounding tissues without intervention. Dr. Copeland further admitted that there is no evidence in this case that Ms. Cheese's urine was infected. Accordingly, he did not disagree that the standard of practice in such a situation would permit observing the extravasated urine by imaging studies to see if it absorbs over a period of time. This is consistent with Dr. Wood's testimony that in the ordinary course with a perforation of the kidney he would not necessarily stent the patient but would keep her under observation.

17. Furthermore, in this case, the hospital records show that Plaintiff did not return to the hospital until 11:1 7 a.m. on April 17, 1998 -- more than 48 hours after the procedure -- although she

testified that she had been advised by the VAMC to return at 3:00 a.m., i.e., more than eight hours earlier, when her neighbor called the hospital for her.[17] A renal ultrasound was done on Plaintiff within less than 3 hours of her return to the hospital, at 1: 16 p.m., and it was this ultrasound that gave the first indication that fluid was leaking from her kidney. This was confirmed by a CT scan done at 4:06 p.m., and by 4:30 p.m., Ms. Cheese was being prepped for the stent placement surgery. She was taken into the operating room by 5:15 p.m., i.e., less than six hours after she returned to the hospital. Dr. Copeland admitted that he, too, would do an ultrasound and/or a CT scan before placing a stent in a patient. He further admitted that it takes some period of time for a hospital to get those tests set up and that the imaging procedures themselves take a certain amount of time.

18. Based upon the foregoing, the Court finds no violation of the standard of care with

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[17] As to why it took her so long to get to the hospital, Plaintiff testified only that "it took some time for me to get it together to get there." [9/13/04 a.m. Tr. p. 62.]

respect to Plaintiff not having been stented until late in the afternoon on April 17,1998.

C. Plaintiffs Discharge on April 16, 1998

19. The Court does, however, find that the standard of medical care was violated when the VAMC discharged the morning of April 16, 1998 when she was undeniably still having a great deal of pain. Plaintiff's testimony that she was still in a great deal of pain is corroborated by the hospital records, specifically, Plaintiff's Ex. D6, which shows that Plaintiff repeatedly complained of severe pain throughout her postoperative admission to the hospital and was administered high dosages of morphine and Percocet virtually every two hours right up until her discharge in an attempt to alleviate her pain. In this regard, the Court credits, and concurs with the opinion of Plaintiff's expert, Dr. Copeland. Dr. Copeland opined that Plaintiff was discharged prematurely and the standard of care was violated because Plaintiff was still, at the time of her discharge, in great deal of pain and the doctors discharged her without having done any diagnostic tests prior to her discharge to attempt to determine the cause of the pain.

20. Neither Plaintiff's expert nor Dr. Wolf, the attending urologist, refuted Dr. Copeland's

opinion. Dr. Wolf, in fact, admitted that he wished they had not discharged Ms. Cheese to go home because, as a result, "she went through suffering that she didn't need to." Dr. Wood also admitted that, given the level of pain Ms. Cheese was experiencing as evidenced by the quantity of narcotics she was given, somebody more senior should have been called in and consulted before she was discharged.

21. The Court further finds that this violation of the standard of care was a proximate cause of Plaintiff's pain and suffering, loss of enjoyment of life and mental anguish from April 16 - April 17 , 1998. As indicated, Dr. Wolf admitted that as a result of having been discharged the morning of April 16, 1998 when she still in a great deal of pain and without having determined the cause of the pain caused Ms. Cheese to "[go] through suffering that she didn't need to."

22. However, the evidence presented is insufficient to support a finding that Plaintiff's discharge the morning of April 16, 1998 was a proximate cause of the loss of her kidney. Plaintiff's theory is that scarring resulting from the leakage of urine was what caused the calcification of her kidney which, in turn, required that it be removed.

However, had Plaintiff been kept in the hospital, it is not at all certain that she would have been stented to stop the urine leakage any sooner. As indicated above, Plaintiff's own expert, Dr. Copeland, admitted that the presence of urine outside the kidney and the renal pelvis if uninfected -- as was the case with Ms. Cheese -- does not normally require surgical intervention and the natural course of the human body would ordinarily be for urine to be reabsorbed into the surrounding tissues without intervention. Dr. Copeland further did not disagree that the standard of practice in such a situation would permit observing the extravasated urine by imaging studies to see if it absorbs over a period of time. This, as indicated, is consistent with Dr. Wood's testimony that in the ordinary course with a perforation of the kidney he would not necessarily stent the patient but would keep her under observation.

23. Furthermore, although Plaintiffs expert, Dr. Copeland, opined that his "gut feeling" was that had Ms. Cheese been stented the morning after the procedure, i.e., on April 16, 1998, instead of having been discharged to go home that morning, there might have been less scarring of the

kidney, he admitted that he could not say that earlier stenting Plaintiff would have entirely eliminated the danger of scarring such that Plaintiff would not ultimately have needed a nephrectomy.

24. Indeed, Dr. Eduardo Kleer, the urologist who treated Plaintiff after she treated with the VAMC and who ultimately removed Plaintiffs kidney, testified in his deposition that scar tissue had built up "from everything that she had gone through," i.e., not only as a result of the perforation of her kidney at the VAMC but also from the two stent surgeries – one performed by the VAMC and the other performed by Dr. Kleer -and from the surgical procedure later performed by Dr. Kleer to insert a drainage tube into Plaintiffs kidney to allow her kidney to drain to a bag outside of her body. *[See* Kleer Dep., pp. 20-26.]

24. In sum, the evidence presented is far too speculative to draw a nexus between Plaintiff s discharge on April 16, 1998 and the ultimate loss of her kidney two months later.

25. However, as indicated, the Court does find that the evidence presented was sufficient to show that Plaintiff s discharge the morning of April 16 was a proximate cause of Plaintiff's pain and

suffering, loss of enjoyment of life, and mental anguish from April 16 - April 17, 1998, and for that she should be compensated. The Court finds that $15,000 is a reasonable sum to compensate Plaintiff for one day of pain and suffering given all of the circumstances presented in this case.

IV. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that JUDGMENT be entered in favor of Plaintiff Jacqueline Cheese and against Defendant United States of America and that DAMAGES BE AWARDED to Ms. Cheese in the amount of$15,000, plus interest, costs and reasonable attorneys fees. With regard to the award of attorneys' fees and costs,

IT IS FURTHER ORDERED that, within 14 days of the date of this Opinion and Order, Plaintiffs' attorneys shall file with the Court and serve upon Defendant a verified and itemized affidavit of costs and fees incurred in connection with this matter.

s/Gerald E. Rosen Gerald E. Rosen
United States District Judge

Dated: September 27,2006

I hereby certify that a copy of the foregoing document was served upon counsel of record on September 27,2006, by electronic and/or ordinary mail.

s/LaShawn R. Saulsberry
Case Manager

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS

IN THE APPEAL OF JACQUELINE A. CHEESE — SS 369 82 1678

DOCKET NO. 06-36 623) — DATE OCT 16 2008
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)

On appeal from the
Department of Veterans Affairs Regional Office in
Detroit, Michigan

THE ISSUE

Entitlement to benefits under 38 U.S.C.A. § 1151for the loss of the right kidney subsequent to a VA medical procedure,

REPRESENTATION

Veteran represented by: Timothy E, McDaniel,
Attorney at Law

WITNESS AT HEARING ON APPEAL

The veteran

ATTORNEY FOR THE BOARD

K. M. Schaefer, Associate Counsel

INTRODUCTION

The veterans served on active duty from December 1984 to March 1988.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a rating decision issued in May 1999 by the Department of Veterans Affairs (VA) Regional Office (RO) in Detroit, Michigan.

In October 2007, the veteran testified at a personal hearing before the undersigned, sitting at the RO. A transcript of that hearing is assodated with the claims file. At this hearing, the veteran submitted additional evidence consisting of trial documents, VA treatment records, and statements from physicians. *See* 38 C.F.R. § 20.1304 (2008). The Board notes that the veteran waived agency of originaJ jurisdiction (AOJ) consideration of such evidence. *Id.* Therefore, the Board may properly consider such evidence in rendering its decision.

The Board observes that the RO has characterized the issue on appeal as one to reopen a claim of entitlement to benefits under § 1151. However, the Board notes that the veteran filed a timely notice of disagreement in August 1999, which was subsequently followed by a statement of the case in September 1999 and a substantive appeal in March 2000. The appeal was not certified to the Board, but there is no indication that the veteran wished to withdraw her appeal at any time. The delay in certification to the Board appears to be a result of the need to reconstruct the veteran's daims file. as indicated in a November 2004 letter to the veteran from the RO. Consequently, the issue on appeal is the original claim for benefits under 38 U.S.C.A. § 1151 and consideration of whether new and material evidenee has been submitted is not necessary.

FINDINGS OF FACT

1. The veteran has an additional disability of the loss of her right kidney.

2. The veteran consented to a cytoscopy, retrograde pyelogram and possible

ureteroscopy on her left side, one possible complication of which was damage to the ureter.

3. The veteran underwent a renal washing on her right side as part of the procedure for a retrograde pyelogram, and the perforation of the right ureter during the right renal washing was a reasonably foreseeable complication of that procedure.

5. The perforation of the right ureter was the proximate cause of the loss of the veteran's right kidney.

6. Resolving all reasonable doubt in the veteran's favor, the veteran did not consent to the performance of a cytoscopy, retrograde pyelogram, and possible ureteroscopy on her right kidney.

CONCLUSION OF LAW

Entitlement to compensation under the provisions of 38 U.S.C.A. § 1151 for loss of right kidney is

established 38 U.S.C.A.§ 1151 (West 2002); 38 C.F.R § 3.361 (2007).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

As the Board's decision herein to grant benefits under 38 U.S.C.A. § 1151 is a full grant of the benefit sought on appeal, no further action is required to comply with the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (2000), enacted November 9, 2000 (codified at 38 U.S.C.A. §§ 5102, 5103, 5103A, 5107 (West 2002 & Supp. 2008)) and the implementing regulations.

Section 1151 of Title 38 of the United States Code was modified by section 422(a) of Public Law 104-204, 11 0 Stat 2926 (1996), for all claims filed on or after October I, 1997, to require not only that the VA treatment in question. resulted in additional disability, but also that the proximate cause of the additional disability was carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on VA's. part in furnishing the surgical treatment, or that the proximate cause of the additional disability was an event that was not

reasonably foreseeable. VAOPGCPREC 40-97, 63 Fed. Reg. 31,263 (1998). With regard to the former element, it must be shown that VA's care, treatment, or examination caused the veteran's additional disability and VA failed to exercise the degree of care that would be expected of a reasonable health care provider or that VA furnished such care, treatment, or examination without the veteran's informed consent. 38 C.F.R. § 3.361(c), (d) (2007).

To determine whether the veteran has additional disability, VA compares the veteran's condition immediately before the beginning of the hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy (CWT) program upon which the claim is based to the veteran's condition after such care, treatment, examination, services, or program has stopped. VA considers each involved body part or system separately. 38 C.F.R. § 3361 (b) (2007).

When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the

Secretary shall give the benefit of the doubt to the claimant, 38 U.S.C.A. § 5107 (West 2002); *see also Gilbert v. Derwinski,* 1 Vet. App. 49, 53 (1990).

The veteran contends that damage to the ureter of her right kidney during surgery at a VA hospital for a disorder of her left kidney ultimately resulted in the loss of her right kidney, Therefore, she contends that she is entitled to benefits under § 1151 for the additional disability of the loss of her right kidney.

By way of background, in April1998, the veteran presented to the VA Medical Center (VAMC) in Detroit, Michigan with pain in the left flank. A CT scan was negative. Suspecting left kidney stones, physicians at the VAMC provided pain medication and advised the veteran to return if the pain persisted. The Veteran returned to the VAMC a few days later with the pain unresolved. Records note the presence of left flank pain and the presence of gross hematuria (blood in the urine visible to the naked eye) at that time. The record also reflects that the veteran was anergic to contrast dyes, thus prohibiting injection of a contrast dye into her blood stream to allow a noninvasive diagnostic X-ray to be performed.

Accordingly, the veteran was scheduled for an outpatient surgical procedure to ascertain the cause of her pain, to include ruling out the presence of left kidney stones.

The medical evidence shows that the procedure was described as a cystoscopy, retrograde pyelogram, possible ureteroscopy, left. A possible complication of this procedure was damage to the ureter. The record reflects that the veteran consented to the procedure as described to her by the physician and on the consent form. (The actual consent form the Veteran signed is not available, but no one involved disputes this description of its contents.) According to the operation report, upon a finding that there was no evidence of obstruction or any other abnormalities of the left kidney, the surgeons noted that there was what appeared to be reddish urine emanating from the right ureteral orifice. Unsure whether it was true hematuria or the result of the veteran being given Pyridium, which could also have been the cause of the red color of the urine, the surgeons decided to perform the retrograde pyelogram on the right side as well. Again, no abnormality was noted. The report then indicates that right and left renal pelvis washings

and a bladder washing wefe performed, and the results sent for cytological analysis. The report concludes with a comment that there were no complications, and the veteran tolerated the procedure wel!.

VA treatment records reveal that, upon waking, the veteran reported excruciating pain in the right flank, which required that high doses of narcotics be administered. As a consequence, she was admitted into the hospital for observation. The next morning, although still in pain, the veteran was administered morphine, provided a prescription for additional pain medicine, and discharged. The day after that, approximately 48 hours after the operation, the veteran returned to the emergency room where she was readmitted with right flank pain and high fevers. A CT scan was performed, which revealed urine leaking from the right kidney. A second surgical procedure was then performed, 58 hours after the first procedure, during which a perforation of the right ureter was found. A stent was put in place. Upon discharge a week later, the veteran was given instructions to return for removal of the stent in three weeks.

However, apparently distrustful of VA physicians, the veteran chose to pursue treatment by a private physician. This physician replaced the stent, but in spite of the stent, the leakage of urine continued. As a result, over time the veteran underwent a number of procedures. Finally, in July 1998, upon examining the right kidney, the surgeons at that time found the kidney was calcified due to scarring, as wen as the leaking of the urine. Therefore, upon consent of the veteran's family, the right kidney was removed in total.

Initially, the Board acknowledges that a September 2006 decision of the District Court of the Eastem District ofMichlgan, found that the VA Medical Center was liable for the pain and suffering suffering by the veteran during the day between her initial discharge after surgery and her subsequent return to the hospital. Although such decision is relevant to the claim, VA is not bound by such a finding in rendering a decision with regard to the veteran's entitlement to benefits under VA statutes and regulations. CF *Collier v. Derwinski*, 1 Vet. App. 413, 417 (1991). Furthermore, although the veteran's expert at trial, Dr. JC, suggested that earlier treatment of the right kidney

might have reduced the scarring, he could not state that it would have prevented the need for the right nephrectomy.

With regard to the evidence necessary to support a claim under§ 1151, the Board first determines that the requirement that the veteran present an additional disability has been met Multiple documents in the claims file reflect that the veteran suffered a perforation of the right ureter during the first surgery, which led to leakage of urine requiring further surgical procedures, which in turn resulted in scarring and calcification of the right kidney that necessitated removal of the right kidney. Therefore, the Board finds that the veteran has an additional disability aftlle loss of the right kidney,

Tlle Board also observes that subsequent to the right nephrectomy, it was determined that the cause of the veteran's left flank pain was hematuria loin syndrome, which is apparently untreatable and is usually mitigated or resolved by redirecting some of the work of the affected kidney to the other kidney or complete removal of the affected kidney. However, given the fact that the

veteran has already had her right kidney removed, such procedures are not available to her. The veteran has argued that these circumstance essentially create another additional disability. Nevertheless, although cognizant of the pain and suffering the veteran must endure as a result of her limited options in treating her left kidney disorder, the Board observes that the veteran has not suggested, nor does a record reflect that her left kidney disorder is in any way a result of the treatment she received at the VAMC. Further, the limitation of treatment options available to the veteran as a result of the loss of her right kidney, although unfortunate, does not constitute an additional disability tor which compensation under 38 U.S.C.A. § 1151 may be afforded. Thus, for the purposes of this decision, the loss of right kidney is the only disability at issue.

As for causation. it is not in dispute that the removal ofthe right kidney was the end result ufthe action of perforating the fight ureter. Thus, the case turns on whether the perforation of the right ureter was a result of carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of VA, to include the performance of a

procedure on the veteran without her informed consent; or, whether the perforation of the right ureter was not a reasonably foreseeable event during the performance of the procedure.

The Board notes that the veteran consented to a cystoscopy, retrograde pyelogram, possible ureteroscopy on her left side with one possible complication being a damaged ureter. According to the District Court decision, the physicians providing evidence on behalf of both parties (the veteran and the VAMC) concurred that a perforated ureter would usually heal uneventfully and that they had never seen a case where a kidney was lost due to a perforated ureter. However, benefits under § 1151 are dependent on whether the proximate cause of the additional disability was foreseeable. Thus, in this case, the perforated right ureter was the initial injury that resulted from the veteran's surgery and the proximate cause of the loss of the kidney, and the only question is whether the perforation was a foreseeable complication of the procedure or the result of negligence or carelessness on VA's part. As indicated above, the perforated ureter was a

foreseeable complication of the surgical procedures.

The Board observes that evidence has been provided by a numher of physicians to include Dr, JSW, Dr. DW, and Dr. M. of the VAMC; Dr. JC, Dr. RD, and Dr. EY, who provided evidence on behalf of the veteran; and Dr. JH, an expert appointed by the District Court. The Board first notes that, although it is uncertain when the perforation of the ureter occurred, of those who offered an opinion on this question, there is agreement that it most likely occurred during the renal washing on the right side.

Thus, the next question raised is whether the VA was careless or negligent either by performing the renal washing in the first place or in the method used to perform the renal washing. Dr. JSW, Dr. DW, and Dr. JH concur that a renal washing is part and parcel of a retrograde pyelogram. Dr. JC has opined that the veteran did not consent to a renal washing and that a renal washing need only have been done if the veteran's urine had shown signs of cancer cells, which it had not. However, the District Court decision also reflects that all

physicians at trial concurred that gross hematuria is considered to be cancer until proven otherwise. Based on these facts, the Board finds that a preponderance of the evidence demonstrates that a renal washing was a de facto part of the retrograde pyelogram.

Dr. JC provided evidence that the steps involved in a renal washing were performed in the wrong urder in the veteran's case. However, he could not say that the performance of the steps in a different order would not have resulted in a perforation to the right ureter. Therefore, the Board concludes that VA was not careless or negligent in the overall performance of the renal washing. Further, as indicated, damage to the ureter was a foreseeable complication of the retrograde pyelogram, and thus, was a foreseeable complication of the renal washing. Consequently, the right kidney was damaged and removed as a result of a foreseeable complication of the procedure performed.

Nevertheless, the Board observes that the veteran's primary contention is that she did not consent to any procedure being done on the *right side* of her

body, To the extent the content of the consent form is discussed by the various physicians in their statements, the majority of physicians found the consent form the veteran signed to be adequate. The only physician 10 argue that consent was inadequate was Dr. RD, who states that the veteran should have been informed that kidney loss was a possible complication. The Board, however, finds the contention that the veteran should have been told that she could lose a kidney to be unreasonable given that, as indicated, the physicians at trial concurred that the loss of the veteran's right kidney was an extraordinary outcome of the veteran's surgery.

Nevertheless, to reiterate, the veteran consented to a cystoseopy, retrograde pyelogram, possible ureteroscopy (L), The physicians at trial agreed that the (L), indicating the left side, applied only to the possible ureteroscopy (which was not performed) and that the other procedures were to be bilateral. The Board also notes that the District Court decision reflects that no testimony presented at trial concerning the pre-operative discussion with the veteran indicated that she was ever told that the procedure was to be done only on her left kidney.

At the same time, the Board observes that this statement does not demonstrate that the veteran was explicitly informed that the procedures would or could be performed on the right side. Dr. W testified at trial that to only assess one side would have been a gross substandard of care and that it was always intended that the procedure would be bilateral. However, the first April 1998 operation report and statements by the VA surgeons reveal that the impetus for performing the procedure on the right side was seeing what they thought could be red urine coming from the right orifice. Further, Dr. W. indicated to the District Court that the ureteroscopy was not performed because it was usually harder on the patient, was only indicated when the retrograde pyelogram showed an abnormality, and was not considered an option because the veteran had only consented to the procedure on the left. The Board wonders why, if the procedure would not be an option if only consented to for the left side, consent was not obtained for the right side. Overall, to the Board, these facts call into question whether performing the procedure on the right side was actually part of the surgical plan prior to the operation and

whether there was any implication made to the veteran that the operation was to be bilateral.

Moreover, the facts of this case in their simplest form show that the veteran was experiencing left flank pain, that her left kidney was scanned, and that she was scheduled for outpatient surgery to rule out left kidney stones. Given the fact that the consent form did not clearly reflect that the cytoscopy and retrograde pyelogram were to be bilateral and that the veteran was never apparently told that they would be, the Board finds that there is a reasonable doubt that the veteran would have understood that the surgery would or could involve her right kidney. Consequently, the Board resolves all reasonable doubt in the veteran's favor and concludes that the VAMC did not have informed consent from the veteran with regard to the performance of any surgical procedure on the right side of her body. Thus, although the veteran's additional disability of loss of the right kidney was the result of a foreseeable complication (a perforated ureter) of the procedure performed, the Board finds that VA's care and treatment caused the veteran's additional disability and such care and treatment

was provided to the veteran without her informed Consent. Accordingly, all elements of a claim for benefits under § 1151 have been met, and the veteran's claim for such benefits is granted.

ORDER

Benefits under 38 U.S.C.A. § 1151 for the loss of the right kidney subsequent to a VA medical procedure are granted.

/s/David L. Wight

DAVID L. WIGHT
Acting Veterans Law Judge,
Board of Veterans' Appeals